of limited governments); by the exigencies of the times; by the consideration of the local injury, temporarily, to our State that would follow a different decision, and the fact that the question can only be decided finally by the Supreme Court of the United States, we hold that the Act of Congress, making treasury notes a legal tender, is within the Constitution and valid. Such will be the ruling of this Court, till the Federal Court shall determine the question otherwise. The Bank, by redeeming in treasury notes, does not expose her franchises to forfeiture. The judgment below is affirmed with costs.

It is therefore considered by the Court that the judgment of the Court below, in the above entitled cause, be in all things affirmed, at the costs of the appellant; all of which is ordered to be certified to said Court. And it is further considered by the Court, that the appellee recover of the appellant the sum of , for her costs and charges in this behalf expended.

Superior Court of the City of New York. May, 1862.

CHARLES B. HOFFMAN *et al. vs.* DANIEL MILLER *et al.*

M., C. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other for collection, and knew that each remitted paper for collection belonging to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *futuro* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and

immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill belonged to M., C. & M., but on demand thereof refused to surrender it.

Held, That the plaintiffs could not retain the bill as against *M., C. & M.*, as indemnity against the balance owing to them by *J. L. & Co.*, and that they were not *bond fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M.

Held, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration.

Appeal by the defendants from a judgment. This suit, when commenced, was brought against *Allan Hay & Co.*, as acceptors of a bill of exchange, dated "*Houston, Texas, September* 22, 1860," drawn by *John Dickinson* on *Allan Hay & Co.*, of New York, for $1100, payable thirty days after sight to the order of *Miller, Cloud & Miller;* and "accepted October 5, 1860, payable at the Bank of Commerce, in New York." When received by the plaintiffs it was indorsed thus:—"*Miller, Cloud & Miller,*" "*Pay Messrs. Hoffman & Co., or order, for collection,* JOSIAH LEE & Co., eleven hundred dollars." Allan Hay & Co. having no defence, except that they were ignorant to whom the bill should be paid (the plaintiffs and Miller, Cloud & Miller severally claiming to own it), were permitted, by an order in the action, to pay the money into Court, and Miller, Cloud & Miller were made defendants in their stead. The question now is, does the money belong to the plaintiffs, or to the substituted defendants Miller, Cloud & Miller?

The *plaintiffs' firm*, at and prior to receiving the bill, were bankers and collecting agents, doing business in the city of New York; and the firm of *Josiah Lee & Co.* were also bankers and collecting agents, doing business in the city of Baltimore.

Miller, Cloud & Miller, on the 20th of October, 1860, doing business in Baltimore, and then owning the bill in question, deposited it with Josiah Lee & Co. for collection, at the same time

indorsing it, in blank, as before stated. On the 23d of October, 1860, Josiah Lee & Co., after indorsing it in the form mentioned, enclosed that and another bill for $77.31, in a letter of that date, directed to the plaintiffs, and reading thus:—

"MESSRS. HOFFMAN & Co.: Dear Sirs:—We enclose for collection and credit, bills stated below. Respectfully, yours,

JOSIAH LEE & Co.

D. S. Cohen	$77.31
Allan Hay & Co.	1100.00"

The plaintiffs, by letter dated October 24, 1860, replied (*inter alia*) as follows:—

"MESSRS. JOSIAH LEE & Co., Baltimore.

Dear Sirs:—We have received your favor of 23d instant, with enclosures as stated.

$77.31 to your *credit*, and

1100.00 acceptance, Allan Hay & Co., due November 4–7, 1860, which we enter for *collection*."

Charles B. Hoffman, one of the plaintiffs, and the only witness on their part, testified thus:—"There were two accounts in the books of each; we kept an account of all paper sent to them (*Josiah Lee & Co.*), and it was called 'our account,' and drafts drawn against it were entered in that account. All paper received from them, and drafts against us, constituted the other account, which was called their 'account.'"

Q. Was the acceptance in suit ever passed to the credit of Josiah Lee & Co. upon your books?

A. No, sir; it was never passed upon the ledger; a memorandum of it was kept on the blotter and another small book. It was not our custom to pass paper to the credit of the remitting firm, in those accounts, until the paper matured and was paid, when we passed them on the ledger. Of the two acceptances mentioned in the letter of October 23d, one was paid on sight, and immediately passed to the credit of Josiah Lee & Co.; the other, being the acceptance in suit, was treated differently.

[The entry in plaintiffs' blotter was thus:—

"351. October 24, 1860.

"JOSIAH LEE & Co., *Baltimore*, (Their account.)

"Their remittance on D. P. Cohen . . . $77.31

——— $77.31

"Allan Hay & Co. . . . . $1100"]

Q. Did you ever draw against any particular remittance, payable in future?

A. No, sir.

Q. Did you ever consider yourself entitled to draw as against remittances for collection prior to their maturity?

A. The question never came up.

Q. Did you ever do it?

A. No, sir; we never had occasion to do it.

Q. You did, at this time, a general collection business for account of customers?

A. Yes, sir.

Q. Any one that chose to deposit paper with you for collection, you forwarded it for collection?

A. Yes, sir.

Q. Was not that the general business of Josiah Lee & Co.?

A. Yes, sir; that was one branch; they were in the habit of receiving paper from other parties and transmitting it for collection.

Q. Was there any express and positive agreement between Josiah Lee & Co., in reference to this acceptance, except by the letter and order given in evidence?

A. No, sir, there was not."

Josiah Lee & Co. failed November 1, 1860, and on the 2d of that month delivered to defendants a written order on the plaintiffs, requiring them to deliver to the defendants the acceptance in question, the order stating, "they (the defendants) being the rightful owners of the same, and we being agents to collect." This order was presented to the plaintiffs, and the acceptance demanded of them before this suit was brought, and they refused to deliver it to the defendants.

The plaintiffs received the acceptance on the morning of the 24th of October. On the 23d there was a balance due to them from Josiah Lee & Co. of . .	$540.28
October 24, plaintiffs paid A. M. Allen on Josiah Lee & Co.'s letter of credit	200.00
October 24, plaintiffs remitted to Josiah Lee & Co. for collection	438.57
October 30, they also remitted to Josiah Lee & Co., for collection, a draft for	3000.00
They drew on Lee & Co., October 29, for . . .	600.00
and October 30, " . . .	3000.00

These drafts were protested; Lee & Co. collected the remittances of October 29th and 30th, and used the proceeds. They now owe the plaintiffs $3901.53, excluding from the calculation the acceptance in question. *Charles B. Hoffman* was allowed, against the objection and exception of the defendants, to testify, that for several months "we always took into account the paper that we had on hand, in remitting for collection, or drawing down our balances with them."

The judge, before whom the action was tried, found as facts (among others) that the paper, remitted by the one firm to the other, "always appeared to be the property of the party transmitting the same; each treated the paper so received from the other as the property of the party from whom it was received, * * the plaintiffs, until the 2d of November, 1860, had no notice that said acceptance belonged to any person other than Josiah Lee & Co., and relying upon the possession of said acceptance, and other securities, amounting to $467.50," they paid the $200 October 24th, and made the remittances of $438.67, and $3000,—"and from October 24th to October 29th, left the balance in plaintiffs' favor, arising from the collection of such drafts, and otherwise, in the hands of Josiah Lee & Co., undrawn for." He held as matters of law, that the plaintiffs, as bankers, have a lien on the bill in question, for the balance due them from Josiah Lee & Co.; and that they have acquired a valid title to the said bill of exchange as *bonâ fide* holders thereof for value; and gave judgment for the

plaintiffs for the amount of the bill, with interest, and ordered that the money paid into court by the acceptors, be applied on said judgment. The defendants excepted to these decisions; and appealed from the judgment to the General Term.

L. B. Woodruff & C. F. Sanford, for appellants.

Wm. C. Russell & G. Spring, Jr., for respondents.

By the Court. BOSWORTH, C. J.—On the facts, which the evidence will justify a jury or judge in finding, we think no discrimination favorable to the plaintiffs, can be made between this case and *Warner* vs. *Lee*, 2 Seld. 144, and *Scott* vs. *The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289.

In *Warner* vs. *Lee*, John T. Smith & Co., with whom the plaintiffs had deposited for collection a note owned by them, made by Osborn & Whallon, sent it in a letter to the defendant, a banker, which letter stated that it was "enclosed for collection." In the present case, the indorsement to the plaintiffs stated that it was "for collection." The letter enclosing it (and another draft) stated that they were enclosed "for collection and credit." This, in the light of the evidence given, means that the draft for $77.31 was enclosed to be credited to Josiah Lee & Co., and the one for $1100, for collection. The small one was paid at sight, and was credited to Josiah Lee & Co. The large one—the one in question—was entered on the plaintiffs' blotter, as received for *collection*, and was never otherwise credited to Josiah Lee & Co.

In *Warner* vs. *Lee*, the plaintiffs had received no advances from John T. Smith & Co. The present defendants received none from Josiah Lee & Co.

In *Warner* vs. *Lee*, Smith & Co. were largely engaged in making collections of notes for merchants in New York, and the defendant was aware of that fact. In the present case, Lee & Co. "were in the habit of receiving paper from other parties, and transmitting it for collection." One of the plaintiffs so testifies, and of course he was aware of that fact.

In each case the accruing balances were collected in a similar manner.

In *Warner* vs. *Lee*, the referee did not find that any advances were made by defendant to John T. Smith & Co., on the credit of the note there in question. In the present case, the judge has found that the plaintiffs made advances to Josiah Lee & Co., on the credit of the acceptance in question. We shall attempt to show that this finding is not warranted by the evidence. Assuming, for the present, that this is susceptible of demonstration, then there is no difference between the facts of these two cases—except that in *Warner* vs. *Lee*, the note there in question was collected, and the proceeds received by the defendant, before any formal notice was given to him that the note was not the property of Smith & Co.; while in the present case, the plaintiffs did not collect the acceptance in question, and had formal notice before this suit was commenced, that it was the property of the defendants.

In *Warner* vs. *Lee*, the court said, that "When the defendant received this note he had notice, from its indorsement, from the course of business of Smith & Co., with which he was acquainted, and from the letter which enclosed the note to him, that it was placed in his hands for collection only, on account of the owners, the plaintiffs in this suit." Under these circumstances, if he had made advances upon account of it, he could not have held the note or its proceeds, against the plaintiffs. *Clark* vs. *Merchants' Bank*, 2 Comst. 380.

In the present case, the plaintiff had the same notice, except such as the *indorsement* furnished. In *Warner* vs. *Lee*, the plaintiffs indorsed the note in blank on delivering it to Smith & Co., and they filled up the blank indorsement with the defendant's name; whereby it was, in form, specially indorsed by the plaintiffs to the defendant. In the present case, the blank indorsement of the defendants was left as they wrote it, and Josiah Lee & Co. wrote under it a special indorsement by themselves to the plaintiffs, in terms stating it was for collection. The present plaintiffs had notice, therefore, that Lee & Co. had received it for collection; that they sent it for collection for the owners; and the natural

inference would be that the payees were the owners, it being indorsed only by them, and by Josiah Lee & Co. *Arnold* vs. *Clark*, 1 Sandf. S. C. R. 491, supports these views. If it be thought that the decision in *Warner* vs. *Lee* conflicts with that in *The Bank of the Metropolis* vs. *The New England Bank*, 1 How. U. S. 234, it would, nevertheless, be our duty to follow it, it being the decision of the court of last resort of this State, and controlling upon us. The latter case was cited in *Warner* vs. *Lee*, 2 Seld. 146, and of course was not overlooked.

In *Clark* vs. *The Merchants' Bank*, 2 Comst. 380, the court treated the material and controlling question as being "whether the bill in question was transmitted to Smith & Co., for *collection merely*, or was to be credited to the plaintiffs *when received* by the former, whether collected or not." Id. And to complete the statement of the material elements entering into the question, GARDINER, J., added: "As the bill was indorsed in blank by the plaintiffs, the legal title passed to Smith & Co., *primâ facie*, and the plaintiffs must establish the fact that it was indorsed and forwarded for the purpose of collection."

In the present case, the plaintiffs have proved by evidence which is uncontradicted, that *Miller, Cloud & Miller* deposited the bill with Josiah Lee & Co. for *collection;* that the latter indorsed it specially to the present plaintiffs, and stated in the indorsement itself that they indorsed it to the plaintiffs for *collection*, and that the plaintiffs, on receiving it, entered it in their books as having been received for *collection*, and by letter to Josiah Lee & Co., informed them that they had entered it for *collection.*

In *Clark* vs. *The Merchants' Bank*, *supra*, GARDINER, J., discusses the evidence therein, as to the classes of funds remitted, and came to the conclusion that one class was remitted to be credited as *cash when received*, and to be drawn against, whether paid or not, at the time of so drawing; and that another class was remitted for collection, and was not to be credited or drawn against, until actually paid.

As to the class which was to be credited as cash *when received*, the Court held that the title passed to John T. Smith & Co., on

their reception of the same, and that their application of the *proceeds* to the payment of their own debt, could not be questioned in a suit against creditors (of John T. Smith & Co.) receiving them in good faith.

The error of the Court below was stated to consist in the assumption "that nothing went into account properly" until collected in the course of business (or in other words that nothing was to be credited as cash *when received*). Id. 385. GARDINER, J., summarily states the position of the parties, *inter se*, with reference to the different classes of remittances, thus: "For the first class they were to be credited with the right to draw upon their correspondents; as to the second and third the N. Y. firm were the *agents* of the plaintiffs, and had no other interest in and control over the assets, than such as was necessary to the discharge of their agency." Id. 385.

In *Scott* vs. *The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289, the Court held, that,—

1. The property in notes or bills transmitted to a banker by his customer, to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor.

2. Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved, or inferred from an *unequivocal* course of dealing.

That case, in all of its material facts, bears a close resemblance to the one before us. And the Court say: "When, therefore, it appears that the bill in question was retained in the possession of the company (the party to whom it was sent for collection), after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, or that *Lyell* (the remitter) ever drew or was entitled to draw on the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be understood that the company at the time of the transfer

stood in the relation of agents for its collection merely." In that case, the defendants received the bill from the company to secure a pre-existing indebtedness, and credited its proceeds to the company after it was paid; and they were held liable to the plaintiff for its amount.

If, therefore, it is clear upon the evidence that the present plaintiffs did not, and were not under any obligation to credit the bill in question to Josiah Lee & Co. *when received*, and that there was no agreement or understanding between them that remittances for collection or a delay to draw for cash balances was to be based upon or influenced by the consideration of holding paper sent for collection and not matured, then it will follow that the judgment in this case is in conflict with *Warner* vs. *Lee* and *Scott* vs. *The Ocean Bank, supra.*

With reference to this question, it may be observed, *first*, that the learned judge who tried this cause states in his opinion that "the only ground upon which the plaintiffs' claim can rest, is a mutual agreement between themselves and Josiah Lee & Co., that all remittances, made by either to the other, should be considered as made upon the faith of any prior remittances by the latter to the former, unless notice was given of the interest of others in the paper first remitted;" and, *second*, that the learned judge did not find as a *fact* that any such *agreement* was ever made.

There is no evidence that any express agreement to that effect was ever made. And we think it quite clear that no such agreement can be inferred from the course of dealing between those parties.

Charles B. Hoffman, one of the plaintiffs, testified as to the course of dealing between his firm and Josiah Lee & Co. thus: "We remitted to them, and they to us; they kept an account with us, and we with them; they drew upon us, and we upon them; sent paper for collection and so on; their remittances to us, if at sight, were collected at once and passed to their credit; the same course was pursued with the paper we sent them." That the question whether the plaintiffs "were entitled to draw as against remittances for collection before their maturity," "never came up;" that they never did it nor had occasion to do it, and that he

does not remember that his firm ever drew "otherwise than against balances" of collections actually made.

The only circumstance furnishing any evidence of any exception to this, as the uniform course of business, is in the testimony of Mr. Hoffman, to the effect that he remembered "one instance when we (his firm) paid a large over-draft by them" (Josiah Lee & Co.). By over-draft, as here spoken of, we understand a draft for a larger amount than the cash balance then standing to the credit of Josiah Lee & Co. Mr. Hoffman testifies that neither firm was "ever under obligation to pay any such draft," and that he thinks there were two or three instances of over-drafts by Josiah Lee & Co.

In opposition to this exceptional transaction, and in support of the understanding being in accordance with that indicated by the usual and common course of their business, is the fact that bills on time, when received, were entered in the books of the plaintiffs as having been received for *collection*, and were never otherwise credited, until actually collected; that the bill in question was sent, entered, and by plaintiffs' letter is admitted to have been received for collection, and never was otherwise credited to Josiah Lee & Co.

This evidence does not in any manner justify the finding of such an agreement, as the Court at special term held it essential for the plaintiffs to establish in order to recover; nor does it furnish any evidence of an obligation on the part of the plaintiffs to give credit to Josiah Lee & Co. for it until actually paid; or of any assent on their part that it, or other bills received under like circumstances, should be held by the plaintiffs as security for remittances subsequently made by them, or for the payment of any cash balance in their favor that might then happen to exist, or might subsequently accrue.

Under such circumstances, evidence by Mr. Hoffman "that we (his firm) always took into account the paper that we had on hand, in remitting for collection or drawing down our balances with them, *at least we did for several months*," should not be allowed any weight.

The answer imports, that this mental operation to which he testifies was of late occurrence and short duration; there is no pretence that it had been disclosed to Josiah Lee & Co., or was authorized or suspected by them—and so long as it is essential to a valid agreement that there should be at least two parties to it; evidence of what the plaintiffs "took into account or consideration," or "looked very closely and relied upon" in making remittances or delaying to draw cash balances, should be disregarded when it is clear that it was unauthorized, and that Josiah Lee & Co. had not the slightest reason to suspect anything of the kind.

We think, therefore, that no discrimination favorable to the plaintiffs can be made between this case and *Warner* vs. *Lee*, and *Scott* vs. *The Ocean Bank*, *supra*. That on the evidence it is clear that the plaintiffs received the bill for *collection*, and knowing that Josiah Lee & Co. received and forwarded to them for collection paper belonging to third persons, as well as paper owned by themselves; that Lee & Co. were not entitled to be credited with the bill until actually collected, and that there is no evidence justifying the claim of a mutual agreement or understanding that remittances for collection by either were made on the faith and security of paper in their hands, not matured and previously received for the like purpose, from the house to which such remittances were made.

We do not deem it material or useful to attempt to discriminate between *The Bank of the Metropolis* vs. *The New England Bank*, and *Warner* vs. *Lee*, or *Scott* vs. *The Ocean Bank*, *supra*. If it be supposed that no material difference exists, it is none the less our duty to conform our decision to the law, as declared by the Court of *dernier resort* of this state.

It is not to be denied, however much it is to be regretted, that there is an apparent conflict between the Courts of this and other states, as to the circumstances sufficient to constitute an indorser of paper a *bonâ fide* holder for value, so as to exclude the equities of third persons, or defences that could be made in a suit between the original parties. *Stalker* vs. *McDonald*, 6 Hill 93; *Warner* vs. *Lee*; *Scott* vs. *The Ocean Bank*, *supra*; *Swift* vs. *Ty-*

son, 16 Peters 1; *Le Breton* vs. *Pierce*, vol. 9, Am. L. R. 737, and note thereto in vol. 1, Id. N. S. p. 35.

It may be observed, however, that the *head note* in *Swift* vs. *Tyson* enunciates no rule in conflict with the decisions in this state. and if the fact was proved in that case (as asserted in the argument of Mr. *Fessenden*), viz.: "that on receiving the acceptance, he (the plaintiff) had given up the note of Norton & Keith, *which had been endorsed by one Child*," the decision is in harmony with those of this State.

The learned author of the *note* upon *Le Breton* vs. *Pierce*, 1 Am. L. R. N. S. p. 38, states that "it has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms are understood. If the term 'collateral' is understood to import that the bills thus held are not taken *on account* of the existing debt, *but only to be held until due, and if paid, the amount* to be applied, and in the mean time the creditor assumes no responsibility in regard to them, *except as the mere agent of the debtor for collection*, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished."

In *The Bank of the Metropolis* vs. *The Bank of New England, supra*, the Court says, "There does not, indeed, appear to be any express agreement that those balances should not be immediately drawn for, but it may be *implied*, from the manner in which the business was conducted; and *if* the accounts show that it was their *practice* and *understanding* to allow them to stand and *await the collection of the paper remitted*, the rights of the parties are the same as if there had been a positive and express agreement." This seems to hold that either an express agreement, or one justly inferrible from competent evidence, of the actual understanding of the parties, of the character stated, would make a holder of bills, received under that agreement, a holder for value to the extent of any balance due to him.

This may be conceded to be law, and yet, if we have taken a correct view of the evidence in the present case, and of its legal effect, the plaintiffs have failed to bring themselves within this

rule. They have not shown an express agreement of this character; they have not furnished any evidence that it was their practice, or the understanding between them and Josiah Lee & Co., that cash balances should stand and await the collection of paper remitted to the party in whose favor a balance might exist.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Spirituous Liquors—Action for Liquors illegally consigned for sale—Who is an Importer.—One who has consigned spirituous liquors to another to be sold in violation of statute 1855, c. 215, cannot maintain an action for the breach of an agreement by the consignee to render an account of sales, pay the value of the liquors sold, and return the residue: *King* vs. *McEvoy*.

One who receives from an importer, and duly forecloses, a mortgage of a cask of spirituous liquors, which is in the United States warehouse, in bond, and pays the duties and receives the cask of liquors, does not thereby become the importer thereof, within the meaning of statute 1855, c. 215, § 2: *Id.*

Common Carrier—Measure of Damages.—In an action against a carrier to whom goods have been intrusted, for not delivering them according to contract, the measure of damages is the value of the goods at the place of delivery, and at the time when they should have been delivered; with interest from that time: *Spring* vs. *Haskell*.

Award—Partiality of Arbitrator.—An award is rightly rejected if, previously to the selection of the arbitrators, a portion of them made an *ex parte* examination of the matter afterwards submitted to them, at the

[1] From Charles Allen, Esq., State Reporter.